

Clearinghouse Rule 14-041

STATE OF WISCONSIN
MESSAGE THERAPY AND BODYWORK THERAPY
AFFILIATED CREDENTIALING BOARD

IN THE MATTER OF RULEMAKING : PROPOSED ORDER OF THE
PROCEEDINGS BEFORE THE : MASSAGE THERAPY AND
MESSAGE THERAPY AND : BODYWORK THERAPY
BODYWORK THERAPY AFFILATED : AFFILIATED CREDENTIALING
CREDENTIALIN BOARD : BOARD
: ADOPTING RULES
: (CLEARINGHOUSE RULE)

PROPOSED ORDER

An order of the Massage Therapy and Bodywork Therapy Affiliated Credentialing Board, to renumber MTBT 5.02; to amend MTBT 6.02 (2) (am); to repeal and recreate MTBT 5.01 and to create MTBT 5.02 and 5.04 relating to unprofessional conduct.

Analysis prepared by the Department of Safety and Professional Services.

ANALYSIS

Statutes interpreted:

Sections 460.04 (2)(a), 460.14 (2) (a) to (j), Stats.

Statutory authority:

Sections 15.085 (5) (b), 227.11 (2) (a), and 460.04 (2) (a), Stats.

Explanation of agency authority:

Pursuant to ss. 15.085 (5) (b), and 227.11 (2) (a), Stats., the Massage Therapy and Bodywork Therapy Affiliated Credentialing Board (Board) is generally empowered by the legislature to promulgate rules that will provide guidance within the profession and rules that interpret the statutes it enforces or administers. Section 460.04 (2) (a), Stats., specifically empowers the Board to draft rules regarding the professional conduct of licensees practicing massage therapy or bodywork therapy. This proposed rule seeks to carry out this mandate by revising the rules related to unprofessional conduct.

Related statute or rule:

None.

Plain language analysis:

The passage of 2009 Wisconsin Act 355 transformed the Massage Therapy and Bodywork Council into the Massage Therapy and Bodywork Therapy Affiliated Credentialing Board (Board). The Act granted the newly formed Board rule-making authority. Pursuant to that authority, the Board reviewed its unprofessional conduct rules and decided the rules were outdated and needed updating. The modernization of the rules will not result in a significant policy change but rather a further clarification of the ethical goals of the profession.

SECTION 1. creates a section identifying the authority to promulgate the proposed rules.

SECTION 2. renumbers MTBT 5.02.

SECTION 3. modernizes the definition of unprofessional conduct for massage therapist and bodywork therapists.

SECTION 4. creates a provision regarding auditing continuing education requirements.

Summary of, and comparison with, existing or proposed federal regulation:

None.

Comparison with rules in adjacent states:

Illinois: The grounds for unprofessional conduct for Illinois licensed massage therapists and bodywork therapists are governed by statute, ILL. COMP. STAT. 225/57. The rules are similar to current Wisconsin unprofessional conduct rules in that they are comprehensive ranging from prohibitions against false advertising to inability to practice with reasonable judgment and skill.

Iowa: The Iowa Administrative Code sets forth the grounds for discipline of massage therapists in 645 IAC 134.2. The rules are similar to Wisconsin in that they cover a variety of topics; however the Iowa rules focus primarily on fraudulent behavior such as fraud in procuring a license, untruthful or improbable statements in advertising, and acceptance of any fee by fraud.

Michigan: Prohibited conduct of massage therapists as set forth in Michigan Administrative Code R 338.723, is limited to eight prohibitions. The prohibitions focus primarily on exceeding the boundaries of a professional relationship with clients such as taking on a professional role when a personal, scientific, legal, financial, or other relationship impairs the exercise of professional discretion or being involved in a dual relationship with a current or former client.

Minnesota: In Minnesota massage therapy and bodywork therapy are identified as complementary and alternative health care practices, Minn. Stat. §146A.01. Those who

conduct alternative health care practices are regulated by statute, Minn. Stat. §146A.08. The statute identifies prohibited conduct covering a variety of topics including: prohibition against sexual contact with clients, adjudication as mentally incompetent and fraudulent billing practices.

Summary of factual data and analytical methodologies:

The Board reviewed its current unprofessional conduct rules and decided that the rules needed to be updated to conform to current practice within the profession. No other factual data or analytical methodologies were used. The Board ensures the accuracy, integrity, objectivity and consistency of data were used in preparing the proposed rule and related analysis.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact analysis:

These proposed rules do not have an economic impact on small businesses as defined in s. 227.114 (1), Stats. The Department's Regulatory Review Coordinator may be contacted by email at Tom.Engels@wisconsin.gov, or by calling (608) 266-8608.

Fiscal Estimate and Economic Impact Analysis:

The Fiscal Estimate and Economic Impact Analysis are attached.

Effect on small business:

These proposed rules do not have an economic impact on small businesses, as defined in s. 227.114 (1), Stats. The Department's Regulatory Review Coordinator may be contacted by email at Tom.Engels@wisconsin.gov, or by calling (608) 266-8608.

Agency contact person:

Shawn Leatherwood, Administrative Rules Coordinator, Department of Safety and Professional Services, Division of Policy Development, 1400 East Washington Avenue, Room 151, P.O. Box 8366, Madison, Wisconsin 53708; telephone 608-261-4438; email at Shancethea.L Leatherwood@wisconsin.gov.

Place where comments are to be submitted and deadline for submission:

Comments may be submitted to Shawn Leatherwood, Administrative Rules Coordinator, Department of Safety and Professional Services, Division of Policy Development, 1400 East Washington Avenue, Room 151, P.O. Box 8366 Madison, WI 53708-8366, or by email to Shancethea.L Leatherwood@wisconsin.gov. Comments must be received on or before July 22, 2014 to be included in the record of rule-making proceedings.

TEXT OF RULE

SECTION 1. MTBT 5.01 is repealed and recreated to read:

MTBT 5.01 Authority. The Definitions of this chapter are adopted by the board pursuant to the authority delegated by ss. 15.085 (5) (b) and 460.04 (2) (a), Stats., to establish the standards of ethical conduct for massage therapists and bodywork therapists.

SECTION 2. MTBT 5.02 is renumbered MTBT 5.03.

SECTION 3. MTBT 5.02 is created to read:

MTBT 5.02 Unprofessional conduct. The term “unprofessional conduct” is defined as violating, aiding, abetting, or conspiring to engage in any of the following:

1. Violating s. 460.14 (2) (a) to (j), Stats., other provisions of ch. 448, Stats., or any provision of a board order.
2. Violating or being convicted of any of the following: s. 940.22, 940.225, 944.15, 944.17, 944.30 (1m), 944.31, 944.32, 944.33, 944.34, 948.02, 948.025, 948.08, 948.085, 948.09, 948.095, and 948.10, Stats.
3. Engaging in fraud, misrepresentation or deceit in applying for or procuring a license to practice massage therapy or bodywork therapy, in connection with applying for or procuring periodic renewal of a license, or in otherwise maintaining a license.
4. Engaging in any act of fraud, deceit, or misrepresentation, including acts of omission to the board or any person acting on the board’s behalf, including department of safety and professional services personnel.
5. Employing illegal or unethical business practices, including either of the following:
 - (a) Fraud, deceit, or misrepresentation in obtaining or attempting to obtain any fee or third-party reimbursement.
 - (b) Engaging in uninvited, in-person solicitation of actual or potential clients, who because of their particular circumstances are vulnerable to undue influence.
6. Knowingly, negligently, or recklessly making any statement, written or oral, in the course of practicing massage therapy, which is likely to deceive, defraud, mislead or create an unacceptable risk of harm to a client, the public, or both.
7. Engaging in False, misleading, or deceptive advertising.

8. Failure to maintain accurate and timely records necessary for the continuity of a client's massage therapy or bodywork therapy treatment. Records are to be maintained for a period of at least 5 years.
9. Performing any act constituting the practice of massage therapy or bodywork therapy on any client without the client's informed consent or after the client has withdrawn informed consent, whether verbally or in writing, or either of the following:
 - (a) Failure to document informed consent.
 - (b) Failure to inform the client that any act of massage therapy may or will be performed by unlicensed personnel.
10. Any practice or conduct that falls below the standard of minimal competence within the profession that results in unacceptable risk of harm to the patient, regardless of whether injury results.
11. Practicing as a massage therapist or bodywork therapist when physical or mental abilities are impaired by the use of controlled substances or other habit-forming drugs, chemicals or alcohol, or by other causes.
12. Practicing as a massage therapist or bodywork therapist with a mental or physical condition that impairs the ability of the licensee to practice within the standard of minimal competence or without exposing a client to an unacceptable risk of harm.
13. Practicing beyond the scope of massage therapy or bodywork therapy.
14. Divulging any information that a client gives in confidence to the licensee or any other information that the licensee obtains about a client in the course of practicing massage therapy or bodywork therapy that a reasonable person in the client's position would want kept confidential unless the information is otherwise required by law to be disclosed or the client specifically authorizes the disclosure of the information.
15. Engaging in sexually explicit conduct, sexual contact, exposure, gratification or other sexual behavior with or in the presence of a client, a client's immediate family member, or a person responsible for the client's welfare. For the purposes of this subsection all of the following may apply:
 - (a) Sexual motivation may be determined from the totality of the circumstances and is presumed when the massage therapist or bodywork therapist has contact with a client's intimate parts without legitimate professional justification for doing so.
 - (b) An adult client shall continue to be considered a client for 6 months after the termination of professional services.

(c) If a client is a minor, he or she shall continue to be considered a client for 2 years after the termination of services or for 2 years after the client reaches the age of majority, whichever is longer.

(d) It is a violation of this paragraph for a massage therapist or bodywork therapist to engage in any sexual contact or conduct with or in the presence of a client or former client who lacks the ability to consent for any reason, including age, medication, or psychological or cognitive disability.

16. Falsification of client records.

17. Failing to provide access to client records when requested by the board or the board's representative.

18. After a request by the board, failing to cooperate in a timely manner with the board's investigation of complaints filed against the licensee. There is a rebuttable presumption that a licensee who takes longer than 30 calendar days to respond to a request of the board has not acted in a timely manner under this paragraph.

19. Failing to comply with universal precautions for preventing transmission of infectious diseases by failing to provide clean clothing, linens and equipment according to the standards recognized by the massage therapy and bodywork therapy profession.

20. Failing to provide draping and treatment that ensures the safety and privacy of a client.

21. Permitting or assisting any person to perform acts constituting massage therapy or bodywork therapy without sufficient qualifications, necessary credentials, adequate informed consent, or adequate supervision. The licensed massage therapist or bodywork therapist is responsible for determining whether general, one-to-one, or on-premises supervision is necessary to protect the client from an unacceptable risk of harm. The licensed massage therapist or bodywork therapist retains responsibility for delegated or supervised acts, unless, the board determines that the delegate knowingly and willfully violated the supervisor's direction or instruction.

22. Failing to inform a client about contraindications of massage therapy or bodywork therapy.

23. Failing to complete continuing education requirements within the time period established by law.

24. Having an adverse action against a credential pertaining to the practice of massage therapy or bodywork therapy by any agency of this or another state, or by an agency or authority within the federal government. This paragraph applies whether the adverse action results in a temporary or permanent limitation, restriction, suspension or

revocation, or whether or not the adverse action is accompanied by findings of negligence or unprofessional conduct.

25. Violation or conviction of any federal or state law or rule, including criminal law, which is substantially related to the practice of massage therapy or bodywork therapy. For the purposes of this subsection the following may apply:

(a) Except as otherwise provided by law, a certified copy of a relevant decision by a state or federal court or agency charged with making legal determinations relevant to this paragraph is conclusive evidence of its findings of facts and conclusions of law.

(b) Under this paragraph, the board has the burden of proving that the act is substantially related to the practice of massage therapy or bodywork therapy.

26. Failure to report to the board any incident in which the licensee has direct knowledge of reasonable cause to suspect that a massage therapist or bodywork therapist has committed any unprofessional, incompetent, or illegal act in violation of state or federal statute, administrative rule, or orders of the board. Reports shall be made within the time necessary to protect clients from further unacceptable risk of harm.

27. Failing to display his or her license in his or her place of business or practice so that it can easily be seen and read by the public. In the case of a mobile practice, a licensee is required to be able to present his or her license for public display.

SECTION 4. MTBT 5.04 is created to read:

MTBT 5.04 Audits. The board may conduct a random audit of all licensees on a biennial basis for compliance with continuing education requirements.

SECTION 5. MTBT 6.02 (2) (am) is amended to read:

MTBT 6.02 (2) (am) A person holding a temporary license shall meet face-to-face with the supervising massage therapist or bodywork therapist as necessary to ensure that the temporary licensee performs competently, including creation and maintenance of records as required in ~~s. MTBT 5.01 (8)~~ s. MTBT 5.02 (8).

SECTION 6. EFFECTIVE DATE. The rules adopted in this order shall take effect on the first day of the month following publication in the Wisconsin Administrative Register, pursuant to s. 227.22 (2) (intro.), Stats.

(END OF TEXT OF RULE)

Dated _____

Agency _____

Chairperson

Massage Therapy and Bodywork Therapy
Affiliated Credentialing Board